ORIGINAL

No. 97-58

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

RECEIVED
SEP 08 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JEFFREY B. GILBERT
Counsel of Record
Johnson Jones Snelling
Gilbert & Davis
36 S. Wabash
Suite 1310
Chicago, IL 60603
(312) 578-8100

ROBERT E. LEHRER
Lehrer & Redleaf
205 W. Monroe Street
Chicago, Illinois 60606
(312) 332-2121

Attorneys for Respondents

Pursuant to Sup. Ct. R. 39, Luella Pennington, moves to file her Brief in Opposition to the above-captioned Petition for Writ of Certiorari in forma pauperis. In support thereof, Ms. Pennington offers the attached declaration evidencing her financial status and states that:

1. She represents a class of unemployment insurance claimants in Illinois;

2. On July 7, 1985, she moved to file this action in forma pauperis in the United States District Court for the Northern District of illinois. That motion was granted on July 19, 1985;

3. From 1985, when the case was filed, until July 31, 1996, Ms. Pennington was represented by attorneys employed at the Legal Assistance Foundation of Chicago ("LAFC"), a legal services organization. Mr. Jeffrey B. Gilbert, one of the attorneys who has represented Ms. Pennington in this matter since it was filed has been a partner at Johnson, Jones, Snelling, Gilbert & Davis, P.C. since September 16, 1994, but was employed at LAFC for fifteen years prior thereto, and he remained as counsel to Ms. Pennington and the class in this case since his departure from LAFC;

4. Robert E. Lehrer has also represented Ms. Pennington since the case was first filed. He was employed at LAFC for 23 years until March 1996 when he became a partner in Lehrer & Redleaf. Since his departure from LAFC, Mr. Lehrer has remained as counsel to Ms. Pennington and the class in this case;

5. LAFC withdrew from representation of Ms. Pennington on July 31, 1996 pursuant to Section 504(a)(7) of Public Law 104-134, which barred federally funded legal services programs such as LAFC from "participat[ing] in a class action lawsuit" after August 1, 1996. Since LAFC's withdrawal, Messrs. Gilbert and Lehrer have continued to represent Ms. Pennington in this matter.

WHEREFORE, Respondent requests that this Court permit her to proceed in forma pauperis.

Respectfully submitted,

JEFFREY B. GILBERT
Counsel of Record
Johnson Jones Snelling
Gilbert & Davis
36 S. Wabash
Suite 1310
Chicago, IL 60603
(312) 578-8100

ROBERT E. LEHRER
Lehrer & Redleaf
205 W. Monroe Street
Chicago, Illinois 60606
(312) 332-2121

No. 97-58

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLITA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

DECLARATION IN SUPPORT OF MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

I, Luella Pennington, state that I am the Respondent in the above-entitled case; that in support of my motion to proceed in this matter without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefore; that I believe I am entitle to redress; and that I desire to respond to the Petition for Certiorari filed by Lynn Q. Doherty ("Petition") and to otherwise defend the Court of Appeals' decision should this Court grant the Petition.

I further state that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to Petition are true:

1. Are you presently employed?

Answer: No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer: I was last employed part-time in September 1986 when I earned approximately $4.00 per hour for 20 hours per week, and I received some additional unemployment insurance benefits for a total of approximately $500.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No

3. Do you own any cash or checking or savings account?

Answer: Yes

a. If the answer is yes, state the total value of the items owned.

Answer: I have a checking account (No. 10000655084) at Merchandise National Bank in Chicago, Illinois. I receive a monthly Social Security

check in the amount of $507. I have approximately that amount, though sometimes a little more, in the account. When a check is deposited, I spend it down through the month until the next check arrives. I also receive $42 in food stamps every month.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

a. If the answer is yes, describe the property and state its approximate value?

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: I have no dependents other than myself.

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury; and I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 21, 1997

Ms Luella Pennington

Ms. Luella Pennington

No. 97-58

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

JEFFREY B. GILBERT
Counsel of Record
Johnson Jones Snelling
Gilbert & Davis
36 S. Wabash
Suite 1310
Chicago, IL 60603
(312) 578-8100

ROBERT E. LEHRER
Lehrer & Redleaf
205 W. Monroe Street
Chicago, Illinois 60606
(312) 332-2121

Attorneys for Respondents

QUESTIONS PRESENTED

Until August 5, 1997, section 303(a)(1) of the Social Security Act, 42 U.S.C. §503(a)(1) (the "when due" clause), unequivocally required that state unemployment insurance laws include "methods of administration ... reasonably calculated to insure full payment of [benefits] when due." In Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994) ("Pennington I"), App. 16-39, cert denied, 513 U.S. 1032 (1994), the court of appeals held that section 237 of the Illinois Unemployment Insurance Act, 820 ILCS 405/237 ("section 237") defines a "method of administration" within the meaning of the "when due" clause and remanded the case for "factual findings and a determination of the issue of section 237's compliance with the 'when due' clause and corresponding regulations." Id. 37-39. On remand, the district court issued extensive findings of fact and held that section 237 violated the "when due" clause. In Pennington v. Doherty, 110 F.3d 502 (7th Cir. 1997) ("Pennington II"), the court of appeals affirmed the district court's judgment.

On July 3, 1997, the Director of the Illinois Department of Employment Security ("Director" of "IDES") filed a petition for certiorari, no. 97-58 which sought review of whether the court of appeals in Pennington I correctly held that section 237 defines a "method of administration" within the meaning of the "when due" clause; and whether, on remand, the district court correctly applied the rule of law enunciated in Pennington I.

On August 5, 1997, however, the President signed of the Balanced Budget Act of 1997, Pub.L. 105-33, 111 Stat. 251. Section 5401 of that statute ("the anti-Pennington provision") provides that:

> Section 1. Clarifying Provision.
>
> (a) In General. - No provision of a State law under which the base period for such State is defined or otherwise determined shall, for purposes of section 303(a)(1) of the Social Security Act (42 U.S.C. 503(a)(1)), be considered a provision for a method of administration.
>
> (b) Definitions. - For purposes of this section, the terms "State law", "base period", and "State" shall have the respective meanings assigned to them under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).
>
> (c) Effective Date. - This section shall apply for purposes of any period beginning before, on, or after the date of the enactment of this Act.

On September 5, 1997, the Director filed a supplemental petition for certiorari asking that the Court either summarily reverse the Pennington decisions or grant the Director's petition, vacate the court of appeals' judgment and remand for further consideration in light of the anti-Pennington provision.[1] That question is now presented to this Court.

---

[1] By letter dated August 4, 1997, this Court's Chief Deputy Clerk, Francis J. Lorson, extended the date for filing this brief until September 6, 1997. To allow us to meet that deadline, the Director's counsel sent as a draft of the Director's supplemental petition before it was filed, and said that they would file it, by mail, on September 5, 1997. We appreciate their courtesy in doing so.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

I. Nature Of The Action 1

II. Statement Of Facts 5

A. The Operation Of Section 237 Of The Illinois Unemployment Insurance Act 5

B. The Reason Section 237 Delays Payment Of Unemployment Insurance Benefits: Wage Record, Wage Request And Movable Base Period Systems 7

C. Luella Pennington And The Class Members 9

III. The "When Due" Clause 11

IV. The Course And Disposition Of The Proceedings . . . 11

ARGUMENT 14

I. The Anti-Pennington Provision Undermines The Central Purpose Of The "When Due" Clause . . . 14

II. Section 237 Is A Method Of Administration Not An Eligibility Criterion 16

III. The Secretaries of Labor Have Not Historically Treated The Base Period As An Eligibility Criterion 22

IV. The Anti-Pennington Provision Will Exacerbate A Deep Decline In The Rate Of Unemployment Insurance Recipiency At An Enormous Cost To The Nation's Poorest Workers 25

V. The Use Of An Alternative Movable Base Period Would Neither Substantially Increase The Costs Of Operating The Unemployment Insurance Program Nor Unduly Burden Employers 28

A. The Costs To States Of Movable Base Periods Are Minimal 29

B. The Costs To Employers Of Movable Base Periods Are Also Minimal 34

CONCLUSION 37

RESPONDENTS' APPENDIX

App. Page(s)

Stipulations Of Fact 1-20

Statement By Day Gilbert, Deputy Administrator Ohio Bureau Of Employment Services, On Behalf Of The Interstate Conference Of Employment Security Agencies, To The House Subcommittee On Ways And Means Subcommittee On Human Resources 21-25

Testimony Before The Human Resources Subcommittee, House Ways and Means Committee, By The Honorable Lynn Quigley Doherty, Director, Illinois Department Of Employment Services, On Behalf Of The Honorable Jim Edgar, Governor Of The State Of Illinois 26-29

Testimony Before The Human Resources Subcommittee, House Ways and Means Committee, By Albert R. Miller, President, Phoenix Closures, Inc. 30-31

Testimony Of Janet L. Norwood, Senior Fellow, Urban Institute, Before The Subcommittee On Human Resources, Committee On Ways and Means, U.S. House Of Representatives. 32-38

Letter Of November 21, 1996 from Al Lee, Chief Deputy Director, Of The California Employment Development Department to The Honorable Patrick Johnston, Of The California State Senate 39-44

U.S. Department of Labor, Unemployment Insurance Legislative Policy: Recommendations for State Legislation, 1962 (1962) 45-57

TABLE OF AUTHORITIES

CASES — **Page(s)**

Auer v. Robbins, __ U.S. __, 117 S.Ct. 905 (1997) 24

California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) 11, 15, 18, 23, 29, 31, 34

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 32

Fleiszig v. Board of Review, 412 Ill. 49, 104 N.E.2d 818 (1952) 19

Fusari v. Steinberg, 419 U.S. 379 (1975) 11, 15, 16

Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982) 15, 29

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 17, 18, 23

Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991) 32

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 4, 28, 29

United States v. Johnston, 268 U.S. 220 (1925) 2

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 4

STATUTES

42 U.S.C. § 503(a)(1) . . . . . passim

42 U.S.C. § 1108(b), (f), see P.L. 102-164 and 102-107 26

Section 5401, Pub.L. 105-33, 111 Stat. 251. . . . . passim

U.S. Sup. Ct. Rule 10, 28 U.S.C. 2-3

820 ILCS 405/237 . . . . . passim

820 ILCS 405/242 . . . . . 5, 6

820 ILCS 405/500.E 5, 6

820 ILCS 405/701 5

STATUTES (cont'd) **Page(s)**

820 ILCS 405/702 5

820 ILCS 405/601 5

820 ILCS 405/602 5

Mass. Ann. Laws ch. 151A, § 1(a) 9

Me. Rev. Stat. Ann. tit. 26, § 1043 9

Mich. Comp. Laws §§ 421.45 and .75 9

N.J. Rev. St. § 43:21-19(c)(1) 9

1995 NY S.B. 7957, Sec. 3 and 28 9

Ohio Rev. Code Ann. § 4141.01(Q) 9

R.I. Gen. Laws § 28-42-3(10) 9

Vt. Stat. Ann. tit. 21, § 1301(17)(B) and (C) 9

Wash. Rev. Code § 50.04.020 9

NJ Legis. 234 (1995) 32

REGULATIONS

20 C.F.R. § 640.1(a)(2) 11, 16-17

20 C.F.R. § 640.3(a) 11, 23

MISCELLANEOUS

Advisory Council on Unemployment Compensation, Defining Federal And State Roles in Unemployment Insurance (Jan. 1996) 26

Advisory Council on Unemployment Compensation, Unemployment Insurance In The United States: Benefits, Financing, Coverage (Feb. 1995) 28, 31

Appendix to Appellants' Brief in Java, No. 507 (U.S. Sup. Ct. 1970) 31

Congressional Research Service, Federal-State Unemployment Compensation System (Sept. 8, 1988) 25

MISCELLANEOUS (cont'd) **Page(s)**

General Accounting Office, Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) 25, 26 27, 36

Haber, Wm. & Murray, M., Unemployment Insurance In The American Economy (1966) 12, 21

U.S. Department of Labor, Unemployment Insurance and Employer Layoffs, Occasional Paper 93-1 (1993) . . . 36

U.S. Department of Labor, Unemployment Insurance Legislative Policy: Recommendations for State Legislation, 1962 (1962) 22

Vroman, Wayne, The Alternative Base Period in Unemployment Insurance: Final Report, Jan. 31, 1995 27

STATEMENT OF THE CASE

I. Nature Of The Action

Respondent, Luella Pennington, and the members of the class she represents, are claimants for unemployment insurance. They brought this case against the Director of the Illinois Department of Employment Security ("Director" of "IDES") to challenge one aspect of the definition of "base period" found in section 237 Illinois Unemployment Insurance Act ("section 237" of "IUIA"), 820 ILCS 405/237. The "base period" is the time within which claimants must have earned sufficient wages to qualify for unemployment insurance benefits. The claimants argued that, by giving rise to an unnecessarily long "lag period" (as described at p. 6 infra), section 237 delays payment of benefits in violation of the "when due" clause, which requires that a state's unemployment insurance law provide for "methods of administration ... reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1).

In her original petition, the Director sought review of the two appellate court decisions in this case. The first of those decisions, Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994) ("Pennington I"), App. 16-39[2], held that section 237 was subject the constraints of the "when due" clause. As respects Pennington

---

[2] The claimants cite to: the Appendix bound with the Petition For Writ of Certiorari (App."); the Petition itself ("Pet."); the Director's Petition For Writ of Certiorari in No. 94-592 ("1994 Pet."); portions of the record transmitted to the Court of Appeals, including documents recorded on the district court's docket ("R."), the trial transcript ("Tr.") and plaintiff's and defendant's trial exhibits ("P.Ex." and "Def. Ex."); and the Respondents' Appendix ("Resp. App."), which is bound with this brief.

I, the Director's petition is virtually identical to one the Director filed in 1994, which this Court declined to grant. Compare Pet. at 3-16 with Petition For Certiorari in No. 94-592 at 4-15; see 513 U.S. 1032 (1994) (denying certiorari).[3] Yet the Director did not even suggest reasons why this Court should grant the writ to review Pennington I, when it would not do so three terms ago.

The Director's original petition also sought review of Pennington v. Doherty, 110 F.3d 502 (7th Cir. 1990) ("Pennington II"), App. 1-15, which affirmed the trial court's resolution of the factual inquiry the Pennington I panel had instructed it to make. See Pet. at 17-21. In that respect, however, the petition asked this Court "to review evidence and discuss specific facts", United States v. Johnston, 268 U.S. 220, 227 (1925), despite the admonition in S. Ct. Rule 10 that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. Rule 10, 28 U.S.C. ("Rule 10").

Moreover, the original petition did not specifically invoke even one of the reasons Rule 10 sets forth as "indicat[ive]" of the type of "compelling reasons" that must be present to warrant an order granting certiorari. Indeed, the Director acknowledged that neither Pennington I nor Pennington II presents any conflict with the decision of any other federal appellate court or any state

---

[3] A typographical error in the Director's petition incorrectly cites the 1994 denial of certiorari as appearing at Volume 573 of the U.S. Reports. Pet. at 1.

court of last resort. Pet. at 8 (Pennington I was a decision of "first impression"); id. at 17-22 (criticizing Pennington II, but not arguing that the ruling presents a decisional conflict within the meaning of Rule 10(a)). Similarly, the Director implicitly acknowledged that neither Pennington I nor Pennington II "decided an important question of federal law that conflicts with relevant decisions of this Court." S.Ct. Rule 10(c); see Pet. at 13, 14, 19, 21 (urging that the court of appeals' reliance on various rulings of this Court was misplaced, but not that the decisions in Pennington I or Pennington II transgressed any such ruling).

Thus, despite the filing of the original petition, Mrs. Pennington and the class had every reason to expect that, after twelve years of litigation, this case would soon end with a judgment in their favor. But the State of Illinois and other sympathetic states then appealed to Congress to overturn Pennington I. That appeal included a request that Congress not be restrained by any "intellectual exercise." Statement by Day Gilbert ("Gilbert Stmt.") at 5, Resp. App. 25. Congress accommodated that request by enacting section 5401 of the Balanced Budget Act of 1997, Pub.L. 105-33, 111 Stat. 251, (the "anti-Pennington provision").

The anti-Pennington provision is the enactment of a lie, and an expression of the government's willingness to gut the most critical public policies that protect our poorest fellow citizens. See pp. 16-28 infra. We appreciate, however, that "judgments about the wisdom of ... [the anti-Pennington provision] remain within the exclusive province of the legislative and executive branches."

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). And though, by its terms and as confirmed by the legislative history, the statute was expressly designed to overturn the decision in Pennington I retroactively, this Court's "cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." Gray, 467 U.S. at 729-30 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976) (citations omitted)). Accordingly, retroactive legislation is not unconstitutional so long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." Id. at 730. We therefore acknowledge at the outset that the anti-Pennington provision eviscerates the claimants' litigation position.

After twelve years of litigation, however, and on the verge of, what we believe, would have constituted important relief, we take the opportunity this Court provides to file a brief in opposition to the Director's petitions, to set the historical record straight as to the realities of Congress's and the President's decisions to subvert the nation's unemployment insurance program so as to undermine a judgment that was critically important to America's poorest workers.

II. Statement Of Facts

The Director herself, or her predecessors in interest, stipulated to most of these facts in the trial court, in the Stipulation of Fact ("Stip."). See Resp. App. at 1-20.[4]

A. The Operation Of Section 237 Of The Illinois Unemployment Insurance Act

In Illinois, an eligible claimant can draw regular unemployment insurance benefits during her "benefit year," which is the one-year period beginning with the Sunday of the week in which she first files a "valid claim" for benefits. 820 ILCS 405/242; Stip. ¶ A.3, Resp. App. 2; Pennington I, App. 18. To file a "valid" claim, however, a claimant must have earned sufficient wages during a year period called the "base period."[5] 820 ILCS

---

[4] The citations to Illinois statutes in the stipulation are to "Illinois Revised Statutes" ("Ill. Rev. Stat."), a prior codification of Illinois law that has been replaced by "Illinois Consolidated Statutes" ("ILCS").

[5] To be eligible for benefits, a claimant must have earned at least $1600 during the whole "base period" and at least $440 outside the calendar quarter in which (s)he earned the most wages. 820 ILCS 405/500.E; see Stip. ¶ A.1, Resp. App. 1, Pennington I, App. 18, n. 1. We call this the "earnings requirement."

Whether a claimant has sufficient wages in his base period is resolved by a "finding" issued pursuant to Section 701 of the IUIA. 820 ILCS 405/701; see Stip. ¶ A.2, Resp. App. 1. If a claimant is monetarily eligible, he is said to have filed a "valid claim." 820 ILCS 405/242, 405/500.E; see Stip. at ¶ A.2, Resp. App. 1, Pennington I, App. at 18.

That a claimant has filed a valid claim does not necessarily mean that (s)he will receive benefits, however, because (s)he can be disqualified based on a non-monetary "determination" issued pursuant to section 702 of the IUIA, 820 ILCS 405/701; see Stip. at ¶ A.2 n. 4, Resp. App. 2, when, for example, the claimant was "discharged for misconduct connected with work" or "voluntarily le[ft] work without good cause attributable to the employ[er]." See 820 ILCS 405/601, 405/602.

405/242, 405/500.E.; see Stip. ¶ A.1, Resp. App. 1, Pennington I, App. 18.

The claimants challenged section 237's definition of the base period because it included only "the first four of the last five completed calendar quarters immediately preceding the benefit year" (the "section 237 base period"). 820 ILCS 405/237; see Stip. ¶ A.4, Resp. App. 2, Pennington I, App. 16-18. By that language, section 237 skips both the calendar quarter in which the claimant files his claim (the "filing quarter") and the preceding calendar quarter (the "lag quarter"). See Stip. ¶ A.5, Resp. App. 2, Pennington I, App. 18; Tr. 16-19. Consequently, when IDES determines whether a claimant has sufficient wages to qualify for benefits, it disregards any wages earned by the claimant in both the filing and the lag quarters (the "lag period"). Id.

Because of section 237, a claimant who lacks sufficient wages in the first four of the last five completed calendar quarters prior to his claim is ineligible for benefits when he first becomes unemployed, even if he would have sufficient wages if his earnings in the lag or filing quarter were counted toward eligibility. Stip. at ¶ 6, Resp. App. 3. But if such a claimant simply waits until his most recent wages fall into the first four of the last five calendar quarters as defined by a later-filed claim, he becomes eligible for benefits. Stip. at ¶¶ 7-8, Resp. App. 6.

Thus, the Director wrongly asserts that the class consists of "claimants who are monetarily ineligible for benefits and who seek eligibility status by including their earnings that fall outside

section 237's base period." Pet. at 5. To make that assertion, the Director must ignore two of her own stipulations: the stipulated class definition, which confirms that class members are claimants who were denied "solely because part of all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of section 237 of the Act", Stip. at ¶ B.3.a; Resp. App. 6 (emphasis supplied); and the stipulation that wages that IDES initially disregards because they fall in a claimant's lag period, become qualifying wages by the passage of enough time so that they fall within the section 237 base period defined by the date of a claimant's second, later-filed claim. Stip. at ¶¶ A.7 and 8, Resp. App. 3. In short, though IDES treats class members as monetarily ineligible when they first apply for benefits, those claimants become monetarily eligible by doing nothing more than waiting until sufficient time has passed, after which they can file a second, valid claim.

B. The Reason Section 237 Delays Payment Of Benefits: Wage Record, Wage Request, And Movable Base Period Systems

Just as the Director ignores the fact that section 237 delays adjudication of eligibility, she ignores the reason why it does so. States have used one of three systems for compiling wage data. See Stip. ¶ C.1-6, Resp. App. 7-9. The most common system, and the one used in Illinois, is the wage record system. Stip. at ¶ C.2, Resp. App. 7-8; Tr. 23. Until recently, many states used wage request systems, Stip. at ¶ C.4, Resp. App. 8, but none still does so. Some states now use "movable" or "alternative" base periods

("ABP"). Stip. at ¶ C.6, Resp. App. 9; P. Ex. 2.[6]

Under a wage record system, employers covered by the state's unemployment insurance statute report gross wages of all their employees to the state unemployment security agency ("SESA") on a quarterly basis. Stip. at ¶ C.3, Resp. App. 8; Tr. 12, 16. In contrast, under wage request systems, wage information was not requested of a claimant's employer until the claimant applied for benefits, when his wages were required to adjudicate his claim. Stip. at ¶ C.4., Resp. App. 8; Tr. 11-16.

A wage record system is characterized by the existence of a gap called the lag period, which falls between the end of a claimant's base period and the beginning of that claimant's benefit year. Stip. at ¶ C.3, Resp. App. 8; Tr. 15-20. The Director has admitted that, in wage record states, "[t]his gap is necessary because time is required for employers to report wages to the SESA and for the SESA to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." Id.; see Pennington I, App. 36. In contrast, SESAs in wage request states could request the most recent wage information for each claimant. Stip. at ¶ C.5, Resp. App. 8; Tr. 15-16. Accordingly, in wage request states, there was no need for a gap between the end of the claimant's base period and the benefit year. Id.; Tr. 13-20.

---

[6] The district judge used the term "ABP". See App. 50-51 (explaining operation of an APB). In its first opinion, the court of appeals used the term "movable base period." See App. at 22 n. 3. In the second opinion, the court of appeals used the "ABP". App. at 4. The claimants use both terms in this brief.

A movable base period system retains certain advantages of a wage record system while minimizing the delay that is experienced, because of the lag period, by those claimants who need their most recent wages to qualify for benefits. See Stip. ¶ C. 6.; Resp. App. 9; Tr. 27. Under an ABP, the state uses a section 237 base period except that, when an applicant has insufficient qualifying wages in that base period, the SESA promptly redetermines the claim based on the wages earned in the four completed calendar quarters prior to the claim.[7] Id.

C. Luella Pennington And The Class Members

Luella Pennington applied for unemployment insurance on June 7, 1984, and thereby created a base period from January 1, 1983 to December 31, 1983. Stip., ¶ B.2.b; Resp. App. 5. Pursuant to section 237, the first and second calendar quarters in 1984 were not in her base period, because those were her lag quarter and filing quarters, respectively. Stip. at ¶ B.2.b.-d; Resp. App. 5-

---

[7] Under most ABPs, when an applicant has insufficient qualifying wages in the section 237 base period, the SESA redetermines the claim based on the wages earned in the four completed calendar quarters prior to the claim. Finding no. 31, App. 50; see Me. Rev. Stat. Ann. tit. 26, § 1043; Ohio Rev. Code Ann. § 4141.01(Q); R.I. Gen. Laws § 28-42-3(10); Wash. Rev. Code § 50.04.020; Tr. 25-27; Mich. Comp. Laws §§ 421.45 and .75. Four states move the base period to include filing quarter wages earned prior to the claim, if necessary, see Vt. Stat. Ann. tit. 21, § 1301(17)(B) and (C); N.J. Rev. St. § 43:21-19(c)(1); Mass. Ann. Laws, 151A § 1; 1995 NY S.B. 7957, Sec. 3 and 28; see Stip. at ¶ C.6., Resp. App. 9; Tr. 27.

Nine states (not eight as the Director contends, see Pet. at 9) use ABPs. See Finding no. 31, App. 50; Stip. ¶ C.6, Resp. App. 9; Pennington I, App. 20. The Director miscalculates because she counts New York as a state still using a wage request system. Pet. at 9-10 n. 4. But New York switched from a wage request system to an ABP in 1996. See 1995 NY S.B. 7957, Sec. 3 and 28.

6. Looking only to the wages Pennington had earned in calendar year 1983, the base period defined by her June 1984 claim, Pennington was ineligible for benefits. Stip. at ¶ B.2.c., Resp. App 5. Accordingly, IDES denied that claim. Id.; P. Ex. 3.

Pennington remained unemployed, however, and filed a second claim for benefits on or about October 5, 1984. Stip. at ¶ B.2.e., Resp. App. 6. The base period determined by reference to that October claim included the period from January 1 through June 30, 1984. Stip. at ¶ B.2.f.; Resp. App. 6. That is, by the passage of time, the quarters that had previously been Pennington's filing and lag quarters when she filed in June, became base period quarters when she filed in October and, consequently, the wages that IDES disregarded for purposes of her June claim, became qualifying wages for purposes of her October claim. Stip. at ¶ B.2.g., Resp. App. 6. She thus became entitled to receive benefits. Id.; see Pet. at 5 (although "Pennington was denied ... [unemployment insurance] benefits upon filing her June 1984 claim because she had earned no wages during her base period[,] ... [i]n October 1984, she [became] ... monetarily eligible for [unemployment insurance] benefits based on her earnings in the first and second quarters ..., and she did receive benefits for the benefit year beginning October 1984 after filing a second ... claim").

To receive benefits, however, Pennington had to wait from June 7 to October 5, 1984, whereas, if IDES had used Pennington's lag quarter wages to determine eligibility, she would only have had to wait from June 7 until July 2, 1984 to file a valid claim. Stip.

at ¶ B.2.a.-g., Resp. App. 5-6; Tr. 70-71. Moreover, the Director has stipulated that "[b]y definition, section 237 delays the date on which each class member can file a valid claim in a manner similar to the delay experienced by Pennington as a result of section 237." Stip. at ¶ B.3.b, Resp. App. 7.

III. The "When Due" Clause

Until enactment of the anti-Pennington provision, the "when due" clause "require[d] that a State [unemployment insurance] law include provision for such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). That standard was derived from California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). The Secretary of Labor has also interpreted the "when due" clause to confirm that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2). That rule is required by this Court's holding in Fusari v. Steinberg, 419 U.S. 379 (1975).

IV. The Course And Disposition Of The Proceedings

On April 11, 1994, in the first of two rulings in this case, a Seventh Circuit panel held, unanimously, that section 237 defined a "method of administration" that was subject to the "when due" clause. Pennington I, App. 16-39. The Director had argued that "section 237 functions as a measurement of each claimant's

attachment to the work force ... [and] that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement." App. at 36. But the court of appeals rejected that argument because the Director "has conceded in more than one place that the gap created by section 237's base period, in which a claimant's lag quarter wages are not reported, 'is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. 36 (citing Stip. ¶ C.3, Resp. App. 8).

The literature concerning the history and purposes of the unemployment insurance program confirms the appellate court's conclusion. See Haber, Wm. & Murray, M., Unemployment Insurance In The American Economy ch. 11 at 175 (1966) (the "lag period between the base period of earnings and the beginning of the benefit year was necessary [in wage reporting states] in order to give a state time to collect and post the quarterly [wage] information"). Accordingly, the appellate panel properly held that "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system." App. 36.

Having "reverse[d] the decision of the district court that section 237 is an eligibility provision as a matter of law," App. 39, the panel then remanded the case to the district court for "factual findings and a determination of the issue of section 237's

compliance with the 'when due' clause and corresponding regulations." App. 38-39. On remand, the district court found that use of an ABP in Illinois would result in "a dramatic increase in financial benefits to unemployed persons", App. 63 (emphasis in original), in that each year, an ABP would pay an additional $30 to $40 million in benefits, id., to "anywhere from 13,800 to 40,000 members of the plaintiff class", and that "even the lowest estimate of 13,800 additional eligible claimants [per year] represents a significant increase in the number of claimants who would receive benefits under an ABP." App. 62. The district court also found that "an ABP results in prompter payment of benefits to both lag quarter eligible and filing quarter eligible claimants." App. 64.[8]

The district court next considered the costs to IDES in adopting an ABP. In doing so, it considered both the annual costs of operating an ABP, and the one-time costs of converting to an ABP. App. 56-58. As to both types of costs, however, it "used only IDES' cost estimates, which are significantly higher than the plaintiffs' ... [even though] IDES' cost estimates may well be inflated." App. 64. It did so, in part, because "using the highest cost estimates should demonstrate most clearly whether the costs outweigh the benefits to plaintiffs." App. 64. Despite using IDES's higher cost estimates, the district court concluded

---

[8] A study undertaken by the California Employment Development Department (the "California study") shows that use of an ABP in California would result in payment of between $36.5 and $92.7 million in additional benefits to between about 30,000 to 50,000 claimants, and in prompter payment of between $121.1 and $233.4 million. Resp. App. 39-44.

that IDES' costs for implementing an ABP "are not so onerous as to outweigh the benefits to plaintiffs." App. 65. The district court "conclude[d] that section 237 violates the 'when due' clause because it does not insure the greatest promptness in paying unemployment insurance benefits that is administratively feasible", id., and entered judgment for the claimants. App. 42.

In Pennington II, the court of appeals observed that the district court's opinion was "thorough and well-reasoned", App. 5, and concluded that the district court had "correctly implemented our mandate [in Pennington I]." App. 14.

ARGUMENT

I. The Anti-Pennington Provision Undermines The Central Purpose Of The "When Due" Clause

In their appeal to Congress, the proponents of the anti-Pennington provision (the "proponents") urged that Pennington I "represents a 180-degree departure from the manner in which both the federal government and states have construed the Social Security Act, since the statute's enactment more than 60 years ago."[9] Doherty Stmt. at 1, Resp. App. 26. To support that assertion, they argued that "[t]he United States Supreme Court has held that the Social Security Act was intended to recognize the importance of each state establishing its own eligibility criteria

---

[9] The proponents contend that this "departure" from the historical interpretation of the "when due" clause was wrought by "unelected federal judges" intent on usurping the legislature's authority on "tax and spending policy." Doherty Stmt. at 1, Resp. App. 26; see id. at 2, Resp. App. 27. But they offered not one iota of support for this accusation against even one of the three judges who sat on the Pennington panel, all of whom were appointed by President Reagan.

for unemployment insurance." Id. at 2, Resp. App. 27. But while "criteria for eligibility [are] largely determined by each state, unemployment insurance is partly financed by the federal government, which naturally has attached some strings to its largesse ... [one of which is] section 303(a)(1) ... of the Social Security Act[, the "when due" clause]." Jenkins v. Bowling, 691 F.2d 1125, 1228 (7th Cir. 1982).

Indeed, Pennington I is not only consistent with, but required by two unanimous Supreme Court cases: California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) and Fusari v. Steinberg, 419 U.S. 379 (1975). See Pennington I, App. 32-36. In Java, this Court recognized that unemployment insurance was designed both "to give prompt ... replacement of wages to the unemployed to enable workers to tide themselves over, until they could get back to ... work ... [and to] exert[] an influence upon the stabilization of industry." 402 U.S. 131-32 (citations omitted). Accordingly, the Java Court held that "'when due' was intended to mean at the earliest stage of unemployment that payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." Id. at 131; see also, Jenkins, 691 F.2d at 1229 (Posner, J.) ("Both the humane (or redistributive) objectives of unemployment insurance and its macroeconomic objective (dampening the business cycle by keeping up the purchasing power of people laid off in a recession) require that unemployment compensation be paid as promptly as possible after the worker is laid off").

The "when due" clause requires not only prompt payment of benefits but also prompt adjudication of claims. This Court made that clear in Fusari, 419 U.S. 379, when it expressly rejected any reading of the "when due" clause under which "benefits are not 'due' ... until administratively deemed payable." Id. at 388 n. 15. The Court reasoned that "such a definition of the 'when due' requirement of federal law would leave little vitality to Java and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." Id.

Thus, the history of "when due" jurisprudence confirms that Pennington I represented a federal court's enforcement of a federal statute, and belies the proponents' argument that Pennington I represents judicial encroachment on state prerogatives. With enactment of the anti-Pennington provision, however, Congress has declared that, from now on, the "when due" clause will assure prompt payment of benefits only if states do not object.

II. Section 237 Is A Method Of Administration, Not An Eligibility Criterion

A. Though the proponents of the anti-Pennington provision hoped Congress would not be constrained by any "intellectual exercise", Gilbert Stmt." at 5, Resp. App. 25, they tried to provide some rationale for proposing to gut the policy of prompt payment of unemployment insurance benefits. Because the "when due" clause governs only the states' "methods of administration" of unemployment insurance programs, "applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. §

640.1(a)(2); see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 482-87 (1977). The proponents therefore urged that section 237 is an eligibility criterion, not a method of administration. See Doherty Stmt. at 1-2, Resp. App. 26-27; Gilbert Stmt. at 3-4, Resp. App. 23-24.

As the court of appeals noted, however, the "truism [that the when due clause governs administrative methods, not eligibility criteria] simply begs the question and, consequently contributes nothing to the inquiry before us." App. 27. Prior to enactment of the anti-Pennington provision, the proper inquiry required a determination of whether section 237 is a method of administration or an eligibility criteria. The anti-Pennington provision resolves that inquiry by dictating that base period definitions are not methods of administration. In over twelve years of litigation, however, no one - not the Director, nor the Secretary of Labor, nor any of the judges or lawyers involved in this case - has ever constructed a cogent argument that would suggest that the lag period serves as anything other than a method of administration.

To press their argument that the lag period is an eligibility provision, not a method of administration, the proponents characterized the Pennington claimants as "individuals who would not qualify using the first four of the last five quarters", Gilbert Stmt. at 4, Resp. App. 24, and they contended that Pennington I therefore "broaden[s] eligibility", Doherty Stmt. at 1, Resp. App. 26, to those not previously eligible. But that is simply wrong. An eligibility provision "define[s] the class of

persons eligible for benefits." Hodory, 431 U.S. at 486-87. The lag period, however, does not exclude claimants from eligibility; it just delays the time at which the state will consider a claimant's most recent wages in determining his or her eligibility. To argue the contrary, the proponents ignored the single most important fact about the operation of the lag period: that the Pennington claimants become eligible for benefits by doing nothing more than waiting until sufficient time has passed to file a second claim, since wages that are initially disregarded because they fall in a claimant's lag period, become qualifying wages by the passage of enough time so that they fall within the first four of the last five completed calendar quarters prior to the filing of the later-filed claim. See Pennington I, App. 33-34.

Like the proponents in Congress, the Director argued in the courts that section 237 is an eligibility criterion. But the court of appeals rejected that argument because section 237 does not concern "what earnings IDES will consider" to determining whether benefits are due, as the Director contended, it only "determines when IDES will count those earnings" and, thus, when benefits become due." Pennington I, App. 33 (emphasis in original). Thus, although Illinois' base period delays the time at which the state will count a claimant's most recent wages toward eligibility, it does not prevent a claimant from using those same wages so long as he waits a sufficiently long time before filing a claim. Causing a claimant to wait to receive benefits, however, is just what the when due clause was designed to prevent. Java, 402 U.S. at 131-33.

B. Eligibility criteria in unemployment insurance statutes "measure a claimant's 'continued and current attachment to the labor force.'" Pennington I, App. 33 (quoting Fleiszig v. Board of Review, 412 Ill. 49, 104 N.E.2d 818, 821 (1952)). The proponents therefore urged that section 237 "[t]he Pennington alternate base period would provide for the payment of unemployment benefits ... to individuals with no established connection to the workforce." Miller Stmt., Resp. App. 30; see also Doherty Stmt at 1, Resp. App. 26 (the lag period "ensures that unemployment insurance will be available for workers with a genuine attachment to the labor force, but not necessarily for those with only a marginal connection").

But that argument is not just wrong, it is perverse. Consider the following table, which exhibits the operation of section 237 on three claimants, each earning $5 per hour:

	1st Quart. Wages	2nd Quart. Wages	3rd Quart. Wages	4th Quart. Wages	5th Quart. Wages	6th Quart. Wages	7th Quart. Wages
No. 1*	0	0	$440	$1160	0	0	0
No. 2**	0	0	0	$2600	$2600	0	0
No. 3***	0	0	0	$2600	$3000	0	$3000

* Receives benefits by filing in the sixth quarter.

** Receives benefits only if he waits to file until the seventh quarter.

*** Receives no benefits because he returns to work just before beginning of 7th quarter.

By any measure of one's attachment to the work force (e.g., amount of wages, hours worked, how recently the claimant was employed prior to applying for benefits), Claimant No. 1 has the most tenuous connection of the three claimants. Yet under section 237, he is awarded benefits in the sixth quarter. By the same measures, if Claimant No. 2 applies for benefits in the sixth quarter, he has a stronger and more recent attachment to the labor force than Claimant No. 1 has when he files at the same time, but Claimant No. 2 is denied benefits in the sixth quarter because of the operation of section 237. If Claimant No. 2 waits and applies again in the seventh quarter, however, he will then be granted benefits, even though his attachment to the work force will have weakened compared to when he first filed in the sixth quarter, just after he lost his job. By every measure, including the fact that he returned to work most promptly, Claimant No. 3 has the strongest attachment to the work force. Yet, because of section 237, he is the only one of the three claimants who receives no benefits at all. Thus, in direct contrast to what any eligibility criterion would do, section 237 "causes ... [claimants] with relatively strong attachment to the work force to wait until that attachment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over)." App. 33-34.

C. Not only have the proponents failed to convincingly suggest how the lag period could serve any eligibility purpose, the have repeatedly conceded that the purpose of Illinois' base period

is solely administrative, not substantive. For instance, in the Pennington litigation itself, IDES admitted that the lag period "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. 36. And in their submission to the Subcommittee, the proponents said that whether states can shorten their lag periods is dependent on whether "technology ... permits states to collect and process wage information more quickly." Gilbert Stmt. at 4, Resp. App. 24.

These concessions confirm what the court of appeals found: that the lag period is "an administrative method employed to accommodate the time needs of a wage record [data collection] system. In a world of high-speed information exchange, the lag quarter would not exist; yet an eligibility requirement like the 'voluntary leaving' provision [which disqualifies claimants who leave work without good cause attributable to the employer] would." Pennington I, App. 36-37. Now, however, by virtue of congressional fiat, lag periods will not be "methods of administration" within the meaning of the "when due" clause, even though, in fact, they will still serve no purpose other than "to give a state time to collect and post the quarterly [wage] information." Haber, Wm. & Murray, M., Unemployment Insurance In The American Economy ch. 11 at 175 (1966). Indeed, the anti-Pennington provision will permit states to employ even longer lag periods than the one used now in Illinois.

III. The Secretaries of Labor Have Not Historically Treated The Base Period As An Eligibility Criterion

The proponents also contended that "since the establishment of the unemployment insurance system, the Labor Department ... has considered a base period of the first four of the last five quarters to be consistent with the [Social Security] Act." Doherty Stmt. at 2, Resp. App. 27; see Gilbert Stmt. at 4, Resp. App. 24. In fact, however, in 1962, the Secretary of Labor issued a policy statement urging states to keep their lag periods "as short as possible" because "unemployment insurance is designed to compensate wage loss", Unemployment Insurance Legislative Policy: Recommendations for State Legislation, 1962, Resp. App. 53, thus confirming not only that lag periods should not unnecessarily delay payment of benefits, but also that the Secretary has historically treated lag periods as administrative methods, which are subject to his regulatory authority, rather than eligibility criteria, as to which he has no such authority. See Pennington I, App. 31.

The proponents relied on draft bills issued by the Secretary of Labor in 1937 and 1950, which include a base period definition like the one used in Illinois. From those draft bills, they contended that "[t]hroughout the history of the unemployment insurance program, determining the period that constitutes the base period for unemployment insurance claims purposes has been one of many eligibility criteria that federal law left to the states." Gilbert Stmt. at 3, Resp. App. 23; see also Doherty Stmt. at 1, Resp. App. 26 (Pennington "represents a 180-degree departure from the manner in which both the federal government and states have

construed the Social Security Act, since that statute's enactment more than 60 years ago").

But this Court has repeatedly refused to treat draft bills even as interpretative rules to which courts should give some deference. Hodory, 431 U.S. at 484-85; compare R. 98 Ex. A (the 1937 draft bill) at 25 with Java, 402 U.S. at 123 n. 1 (invalidating a provision that appears in the 1937 draft bill as violative of the "when due" clause). Moreover, as the court of appeals noted, the "draft bills do not ... directly address the issue here: whether the lag period arrangement can be termed a matter of eligibility as opposed to a matter of administration." Pennington I, App. 30 (footnote omitted). The court therefore concluded that:

> the mere fact that the draft bills take notice of a lag period similar to the ... [Illinois base period] does not indicate that the lag period is in compliance with the 'when due' clause or the corresponding regulations. A state must pay unemployment benefits 'with the greatest promptness that is administratively feasible.' 29 C.F.R. §640.3(a). Needless to say, what was 'administratively feasible' when the draft bills were written - 1937, 1950, and 1962 - is much different from what is administratively feasible in today's technologically advanced world.

Id. at 30-31, n. 6.

Though it is not true that the Department of Labor has historically endorsed section 237-type base periods, it is true that the Secretary filed an amicus brief in the court of appeals supporting the Director. In response to the Secretary's brief, however, the court of appeals confirmed that it was "mindful of the obligation to defer to the interpretation of an agency whenever that interpretation can be said to embody a deliberate and

considered interpretation of the legislative intent." App. 29. And it therefore "examined wi h great care the sources that, in the agency's view, evidence its longstanding view that issues of lag periods are matters of eligibility and therefore are not subject to the 'when due' clause." Id. Nonetheless, that court rejected the Secretary's interpretation because it did not "reflect the deliberate attempt of the agency to implement the will of Congress through the regulatory process." App. 28.

The court of appeals also noted that the Secretary's position was "developed in the heat of litigation." App. 28. In an amicus brief filed in support of the Director's petition, the Attorney General of California relies on Auer v. Robbins, __ U.S. __, 117 S.Ct. 905 (1997), because in that case, this Court deferred to a position taken by the Secretary in litigation. Id. at 912; see Brief of Amicus Curiae States at 10. But in Auer, the Court noted that "[t]here is simply no reason to suspect that the [Secretary's] interpretation does not reflect the agency's fair and considered judgment on the matter in question." Id. In contrast, after its careful examination of the Secretary's various promulgations, the court of appeals concluded that these materials "cast a great deal of doubt on the proposition that the agency ... consistently has treated ... [lag periods] as a matter of eligibility." App. 31. Thus, in contrast to Auer, there was ample reason for the court of appeals to conclude that the Secretary's interpretation did not reflect the agency's fair and considered judgment.

IV. The Anti-Pennington Provision Will Exacerbate A Deep Decline In The Rate Of Unemployment Insurance Recipiency At An Enormous Cost To The Nation's Poorest Workers

In Illinois alone, the enactment of the anti-Pennington provision will prevent a "dramatic" increase of $30 to $40 million in unemployment insurance benefits to "anywhere from 13,800 to 40,000 unemployed persons." App. 63. Moreover, as confirmed by the California study, because many other states use section 237-type base periods, the potential nationwide effect of the legislation is all the more striking.

The importance of those numbers can only be appreciated if they are considered along with the data that confirms the steep decline in unemployment insurance recipiency rates. In 1988, the Congressional Research Service ("CRS") reported that "the share of the unemployed receiving benefits declined to its lowest level in program history, below one-third. In 1987, only 32 percent of the unemployed received [unemployment insurance benefits]." Federal-State Unemployment Compensation System, (submitted to the House Ways and Means Subcommittee on Public Assistance and Unemployment Compensation) (Sept. 8, 1988), § 1.10 at 9. In 1993, in report to the Chairman of the Senate Committee on Finance, the General Accounting Office ("GAO") confirmed that, in contrast to "the 1973-75 recession, [when] up to 50 percent of the unemployed were receiving [unemployment insurance] benefits[,] ... about 39 percent [received benefits] during the recession that begin in 1990 - one fifth less." Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) at p. 12.

The 102nd Congress empaneled the Advisory Council on Unemployment Compensation ("Advisory Council") to study the nation's unemployment insurance program. See P.L. 102-164.[10] In its 1996 report to Congress, the Advisory Council confirmed that, in 1995, 14 states paid unemployment insurance to a quarter or fewer of their unemployed workers, and that Illinois paid only 37.2% of its unemployed. Defining Federal And State Roles in Unemployment Insurance, A Report to the President and Congress, Advisory Council on Unemployment Compensation (Jan. 1996); see Table 4-2 "Ratio Of Unemployment Insurance Claimants To Total Unemployment, By State, 1995." And in her testimony before the House Ways and Means Committee's Subcommittee on Human Resources (the "Subcommittee"), Commissioner Norwood said that the most recent data shows that "only 37.4 percent of the unemployed ... are receiving [unemployment insurance] benefits." Norwood Stmt. at 2, Resp. App. 34.

Furthermore, the GAO's study confirms that the decline in recipiency rates for unemployment insurance is largely due to competition among states to limit the costs of their program. Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) at p. 22. And Commissioner Norwood warned that the Advisory Council's "research showed that the pressures under which many of the states were operating encouraged a 'race to the bottom,' which affected ... low

---

[10] The Council was chaired by Dr. Janet L. Norwood, the former Commissioner of the Bureau of Labor Statistics.

wage workers[, and] ... that the competitive pressures among the states to attract business could well lead to a continued decline in the percentage of unemployed workers who receive benefits." Norwood Stmt. at 4-5, Resp. App. 36-37.

A recent study concludes that "[t]he presence of an alternative [movable] base period raises the number of monetarily eligible claimants by 6 to 8 percent." Vroman, Wayne, The Alternative Base Period in Unemployment Insurance: Final Report (Jan. 31, 1995). Thus, enforcement of a federal standard of prompt payment of unemployment insurance benefits to prevent states' from using long lag periods is critically important to any effort to halt the decline in recipiency.

Also, "[t]he receipt of [unemployment insurance] benefits [is] an important factor in keeping unemployed workers above the poverty level." Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) at 5. By definition, the claimants in the Pennington class are the poorest eligible unemployment insurance claimants. In her testimony, Commissioner Norwood said that the unemployment insurance system in some states "discriminates against the working poor, exactly the group we most need to help in our society", Norwood Stmt. at 5, Resp. App. 37, and that the problem of insuring the working poor against unemployment will grow more acute "as an increasing number of people move from welfare to jobs as the result of the recent welfare legislation." Id.

Given this background, it is not surprising that, in its February 1995 report to the President and Congress, the Advisory Council recommended that "[a]ll states should use a movable base period in cases in which its use would qualify an Unemployment Insurance claimant to meet the state's monetary eligibility requirements." Unemployment Insurance in the United States: Benefits, Financing, Coverage, Advisory Council on Unemployment Compensation, Feb. 1995 at 17. Thus, by enacting the anti-Pennington provision, Congress and the President not only rejected a policy designed to protect the incomes of America's poorest workers, but they did so contrary to the advice offered by the very body they had established to provide precisely such guidance.

V. The Use Of An Alternative Movable Base Period Would Neither Substantially Increase The Costs Of Operating The Unemployment Insurance Program Nor Unduly Burden Employers

As discussed above, the anti-Pennington provision cannot be justified as consistent with the history or purposes that underlie the nation's unemployment insurance program. Accordingly, though the constitutional tests for legislation are extremely forgiving (see pp. 3-4, supra), if the proponents had offered no other rationale for its enactment, the anti-Pennington provision would be subject to attack as not "justified by a rational legislative purpose." Gray, 467 U.S. at 730. But the proponents also contend that alternatives to section 237 are too costly both to the states and to employers. In fact, enactment of the anti-Pennington provision saves states and employers very little, and it does so not only by imposing far larger costs on the poorest unemployed

workers, but also by ignoring the common interest in "dampening the business cycle by keeping up the purchasing power of people laid off in a recession." Jenkins, 691 F.2d at 1229; see Java, 402 U.S. 131-32 (the "when due" clause is designed, in part, to stabilize industry).

Those arguments, however, question whether the anti-Pennington provision is wise, not whether it is rational. And "judgments about the wisdom of ... [the anti-Pennington provision] remain within the exclusive province of the legislative and executive branches." Gray, 467 U.S. at 729. That being said, however, we believe it important to demonstrate just how unwise enactment of the anti-Pennington provision was.

A. The Costs To States Of Movable Base Periods Are Minimal

The proponents contend that section 237 "streamlines administration and minimizes the risk of fraud" because it allows for verification of a claimant's wages with data that "should already be in the state's computer system when the initial claim is filed." Doherty Stmt. at 1, Resp. App. 26. But the testimony in Pennington confirms that a movable base period can be most easily designed by using the very same wage data - collected and processed in precisely the same way - that Illinois does now. Tr. 32-33, 35, 36-37, 89. The only difference would be that, for claimants who need their more recent wages to qualify, instead of enforcing a mandatory delay on use of such wage data, the state would assess eligibility as soon as the more recent wages were entered onto the state's data base. Tr. 57-8. Since exactly the same wage data

would be collected in exactly the same way, a movable base period would neither affect the efficiency of the existing data collection system, nor increase opportunities to commit fraud by submission of improper wage statements, nor impose new paperwork burdens on employers or the state. See Pennington II, App. 5, n. 3 (noting that the district court did not consider the risk of increased fraud to be a consideration because "IDES did not argue ... that adopting an ABP would necessarily lead to an increase in the number of fraudulent claims").

The proponents also argue, however, that the Pennington decision "could have a costly impact upon ... state government[s] ... and aggravate the federal deficit by hundred's of million's of dollars." Doherty Stmt. at 1, Resp. App. 26. They estimate that the administrative costs in Illinois would be "million's of dollars in one-time costs and $2.5 million in yearly operating expenses." Id. at 2, Resp. App. 27; see Gilbert Stmt. at 3, Resp. App. 23 (quantifying the one-time costs at $13 million). They estimate trust fund outlays for additional benefits of 1.5%; but note one study that, they claim, indicates that alternate base periods could "raise state Trust Fund outlays by four to six percent." Doherty Stmt. at 3, Resp. App. 28; Miller Stmt. at 1, Resp. App. 30. From these estimates, they contend that trust fund outlays for a movable base period would be between $100 to $400 million over 8 years which, they assert, would trigger tax increases or rising deficits. Id. From all these figures, the proponents conclude that Pennington I will "cause nationwide disruption in the various

states' unemployment compensation system." Doherty Stmt. at 4, Resp. App. 29.

Even using Illinois' inflated cost estimates, however, the district court concluded that IDES' costs for implementing an ABP "are not so onerous as to outweigh the benefits to plaintiffs." App. 65. Moreover, Illinois' estimates are grossly inflated.

First, as accurately described by the court of appeals, the claimants' evidence supports a narrowly-based challenge to the section 237-type base period; not a challenge based on any alternative base period that any litigant might conceive. App. 22-23, n. 3. Furthermore, as the proponents concede, nine states already use movable base periods. Yet the sky has not fallen in any of them. Indeed, the Advisory Council concluded "that advances in technology have made it feasible for all states to use the most recently completed quarter when determining benefit eligibility." Unemployment Insurance in the United States: Benefits, Financing, Coverage, Advisory Council on Unemployment Compensation (Feb. 1995) at 16. Also, the provision that the Supreme Court struck down in Java was used in 48 states. See Appendix to Appellants' Brief in Java, No. 507 (U.S. Sup. Ct. 1970) at 69-70. Yet the proponents offer no evidence that compliance with Java disrupted the nation's unemployment insurance program at all.

Furthermore, the Department of Labor has received, but not yet published, a report on administrative costs of an alternative base period. From speaking to the authors of that report, we have confirmed that Illinois' cost estimates are wildly inflated.

Illinois' estimates of the administrative costs of a movable base period include unnecessary additional costs for two components: one was a "reachback" system[11], but the most costly was a wage request system to obtain wage data before it is reported in the normal manner. The evidence at trial confirmed that if Illinois did add a wage request component to a movable base period, that alternative would be "administratively feasible" in the sense that, if there was no cheaper alternative, the costs of those systems would be worth the benefits they would generate to the claimants. Tr. 78-79; 88-89; 700-701. But, in Illinois, the marginal benefits of adding a wage request component are too small to justify its greater expense over the alternative of simply using

---

[11] The district court found that "[i]f IDES implements an ABP, it intends to include a 'reachback' system in order to identify an undetermined number of members of the plaintiff class and pay them benefits they were denied under the present system, even though neither ... [of the alternatives for ABPs that plaintiffs suggested] require it." Finding no. 40 at App. 53 (citations omitted). Though the Eleventh Amendment to the U.S. Constitution bars federal courts from ordering IDES to reachback prior to the date of the court's "determination of ... wrongfulness", Fitzpatrick v. Bitzer, 427 U.S. 445, 451 (1976); see Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991), the Director argued that a reachback system was necessary because an ABP might "not be up-and-running... [when] the requisite statutory change is passed." R. 209 at 28-29. But no "statutory change" is necessary to effect relief either. See Pennington I, App. 25-26.

Nonetheless, the district judge credited the Director's argument by construing it as the "belie[f that] a reachback system is necessary because ... [IDES] cannot be certain that any new system would be in place in a timely manner, and thus it would have to pay retroactive benefits for the period from the date the new system should have been operational to the date the new system is actually operational." Finding no. 40 at App. 54 (citations omitted). But New Jersey instituted a movable base period using the most recent completed calendar quarter immediately upon enactment of the statutory change requiring it to do so. See NJ Legis. 234 (1995).

the most recent wage data when it is reported in the usual course. Id. Thus, while Illinois could enhance a movable base period system marginally by incorporating a wage request component, the "when due" clause does not require that it do so. If the unnecessary costs of wage request and "reachback" systems are eliminated from Illinois' estimates, the one-time costs of adopting a movable base period drop $7.1 million, from $13.3 million to $6.2 million, and the yearly operating costs drop $2.4 million, from $2.8 to a meager $400,000. See P.Ex. 23 at 29, P.Ex. 24 at 2, 13, P.Ex. 25 at 24, P. Ex. 26 at 4.

As for trust fund outlays, the evidence at trial confirmed that a movable base period in effect in Illinois during 1986 would have paid a substantial proportion of about 23,000 additional claimants approximately 13.6 million additional dollars, and approximately 13,000 claimants would have been paid benefits sooner. In 1994, the Director estimated that the additional benefits paid to claimants would be about $30 to $40 million a year. See P. Ex. 22. The Director's "high side" estimate of the trust fund costs is now $100 million annually. Doherty Stmt. at 3, Resp. App. 28. But that figures assumes that, because the percentage of claimants who receive benefits would increase by as much as 6% if the state used an alternative base period, the trust fund outlays would also increase that much. Id. That assumption is unquestionably wrong, however, since the vast majority of claimants who would benefit from a movable base period are those who would receive at or near the minimum benefit amount.

Moreover, the assurance in the pre-amendment "when due" clause that states would honor the claimants' interest in prompt payment of benefits necessarily meant greater outlays from the trust fund. But since "the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible ... is what the Unemployment Insurance program was all about", Java 402 U.S. at 135, to complain that states were obligated to pay benefits promptly is to complain of the very purpose of the unemployment insurance system itself. And, conversely, to amend the "when due" clause to protect states from paying benefits promptly is to gut the central public policy that underlies the nation's unemployment insurance program.

Indeed, in her testimony before the Subcommittee on behalf of Illinois' Governor, Jim Edgar, the Director conceded that Illinois was not acting primarily in its own interest by urging enactment of the anti-Pennington provision, but that instead, it was promoting the interests of Illinois' employers. Doherty Stmt. at 1, Resp. App. 26 ("Unemployment insurance is funded almost exclusively by employers. In Illinois, it is funded 100 percent by employers"). Yet, as confirmed below, the costs to employers are not only minimal, but entirely fair.

B. The Costs To Employers Of Movable Base Periods Are Also Minimal

Using the estimate that recipiency would increase by as much as 6% under an alternate base period, Mr. Miller, the one employer-proponent, assumed that taxes on employers would increase by that same rate, requiring payment of as much as $40 million in

additional taxes each year. Miller Stmt. at 1, Resp. App. 30. As noted, however, since the vast majority of claimants who would be benefitted by a movable base period are those who would receive at or near the minimum benefit amount, the percentage rise in recipiency is larger than the percentage rise in trust fund outlays. And since taxes are related to trust fund expenses, not recipiency, they would not rise by 6% either.

Mr. Miller also urged that his company provides long-term, stable employment. Id. If that is so, however, his workforce does not include Pennington class members since they are, by definition, those who have only recent earnings available to qualify for benefits. Moreover, since the tax system in Illinois, like most states, is experience rated, employers who do not have a substantial unemployment insurance claims experience, pay less taxes than employers (such as seasonal businesses) that provide shorter, less stable employment. Thus, if we take Mr. Miller at his word, he has little, if any concern that his company will be burdened by whatever tax increase arises as a result of the Pennington decision.

Moreover, for many years, the employers who do employ Pennington class members have not had to finance unemployment insurance to pay benefits to the Pennington claimants. Those employers have been permitted to escape that part of the excise tax they were supposed to pay for use of the nation's labor supply. Indeed, a study by the U.S. Department of Labor, using data from Illinois, concludes that certain unscrupulous employers obtain a

form of subsidy by laying off workers while their wages are still within the lag period, thereby avoiding the charge that would otherwise be associated with those workers' unemployment insurance claims. Unemployment Insurance and Employer Layoffs, Occasional Paper 93-1, U.S. Dept. of Labor (1993). The researchers estimated that "27 percent of all (UI chargeable) layoffs for a 4-5 quarter period were free layoffs to the firms initiating the layoffs ... [and that] the percentage of layoffs that are free varies from only 13 percent for the largest firms to 39 percent for construction firms." Id. at xiv. They concluded that "this [unemployment insurance] subsidy actually tends to destabilize rather than stabilize employment." Id. at 3. The GAO drew the same conclusion in its 1993 report to the Chairman of the Senate Committee on Finance. Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107, at 5 (Sept. 1993) (Illinois "officials ... said some employers control employee work schedules and earnings to ensure that they do not meet the qualifying requirements").

Thus, by enacting the anti-Pennington provision, Congress has decided to undermine a 60-year old policy of paying unemployment insurance benefits as promptly as possible because some employers who hire the nation's most vulnerable workers prefer not to pay their fair share of the costs of unemployment when they lay those workers off. Moreover, to effectuate that purpose, Congress lied by saying that base period definitions are not methods of administration when, in fact, they could be nothing else.

CONCLUSION

Congressional enactments must be obeyed as if they were wise and true even if they are neither. Accordingly, the anti-Pennington provision compels the Court to grant the Director's supplemental petition for certiorari.

JEFFREY B. GILBERT
Counsel of Record
Johnson Jones Snelling
Gilbert & Davis
36 S. Wabash
Suite 1310
Chicago, IL 60603
(312) 578-8100

ROBERT E. LEHRER
Lehrer & Redleaf
205 W. Monroe Street
Chicago, Illinois 60606
(312) 332-2121

Attorneys for Respondents